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Utah Supreme Court

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Moyle & Moyle; Attorneys for Respondent and Cross-Appellant;

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In the Supreme Court of the State of Utah

WESTERN MACHINERY
COMPANY, a Corporation,
Plaintiff-Appellant,

— vs. —

H. K. RIDDLE and E. J. MAYHEW
*Defendant-Respondent
and Cross-Appellant.*

Case
No. 9611

18 1962

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Clerk, Supreme Court, Utah

Respondents and Cross-Appellant's Petition for Rehearing and Brief in Support Thereof

Appeal and Cross-Appeal From the Third Judicial
District Court of the State of Utah in and
for Salt Lake County
Honorable Stewart M. Hanson, Presiding

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In the Supreme Court of the State of Utah

WESTERN MACHINERY
COMPANY, a Corporation,
Plaintiff-Appellant,

— vs. —

H. K. RIDDLE and E. J. MAYHEW
*Defendant-Respondent
and Cross-Appellant.*

Case
No. 9611

Respondents and Cross-Appellant's Petition for Rehearing and Brief in Support Thereof

PETITION FOR REHEARING

The respondent and cross-appellant, E. J. Mayhew, petitions the court for a rehearing and reargument of the above entitled case upon the following grounds:

POINT I.

THE OPINION OF THE COURT OVERLOOKS THE FULL SIGNIFICANCE OF THE NECESSITY TO DECIDE WHETHER THE AGREEMENT WHICH WAS THE SUBJECT OF THE ACTION IS A RENTAL AGREEMENT OR A CONDITIONAL SALES CONTRACT. THAT DETERMINATION PERTAINS BOTH TO PLAINTIFF'S RIGHT TO RECOVER AS A

MATTER OF SUBSTANTIVE LAW AND THE
MEASURE OF DAMAGES.

POINT II.

THE OPINION OF THE COURT AS WRITTEN
IS UNJUST TO DEFENDANT IN THAT IT
AWARDS THE PLAINTIFF \$2,823.00 MORE
THAN IT ORIGINALLY BARGAINED TO RE-
CEIVE UPON EXECUTION OF THE AGREE-
MENT, *PLUS* INTEREST AND ATTORNEYS'
FEES.

WHEREFORE, petitioner prays that the judgment
and opinion of the Court be recalled and a reargument
be permitted of the entire case.

A brief in support of this petition is filed herewith.

MOYLE & MOYLE

By Hardin A. Whitney, Jr.

HARDIN A. WHITNEY, JR.

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HARDIN A. WHITNEY, JR., hereby certifies that
he is one of the attorneys for respondent and petitioner
herein, and that in his opinion there is good cause to be-
lieve that the judgment and decision of the Court is
erroneous and that the case should be reheard and
reargued as prayed for in said petition.

Dated this 18th day of September, 1962.

Hardin A. Whitney, Jr.

Brief in Support of Petition for Rehearing

STATEMENT OF FACTS

The facts are fully stated on pages 2, 3 and 4 of Respondent's original brief on appeal. A brief resume of the facts is presented here to refresh the court's recollection.

Plaintiff delivered the equipment in question to defendant H. K. Riddle pursuant to the terms of a standard form document labelled "RENTAL AGREEMENT." The form had been modified to provide, first of all, that the Defendants would pay 24 monthly payments of \$511.00 each, said 24 months' payments "guaranteed." The contract further provided "Upon receipt of final payment Western Machinery Company agrees to execute a 'Bill of Sale' to transfer Title of this Tractor Shovel to H. K. Riddle and E. J. Mayhew."

After 17 months, the contract being in default, the plaintiff repossessed the machine and sold it for \$6,400.00. Plaintiff sued for its 17 monthly payments, less payments received, and its costs of repossession, repairs and attorney's fees.

ARGUMENT

POINT I.

THE OPINION OF THE COURT OVERLOOKS THE FULL SIGNIFICANCE OF THE NECESSITY TO DECIDE WHETHER THE AGREEMENT WHICH WAS THE SUBJECT OF THE ACTION IS A RENTAL AGREEMENT OR A

CONDITIONAL SALES CONTRACT. THAT DETERMINATION PERTAINS BOTH TO PLAINTIFF'S RIGHT TO RECOVER AS A MATTER OF SUBSTANTIVE LAW AND THE MEASURE OF DAMAGES.

The court's opinion states that it does not have to decide the question of whether the agreement is a lease or a conditional sales contract. This conclusion seems to be predicated on the assumption that the defense is limited to the contention that, since the Plaintiff sued on the contract as a rental agreement and since the Defendant contends that the agreement is one of conditional sale, the Plaintiff has failed to state a cause of action. Such contention by Defendant was only a limited part of its defense.

The nature of the agreement must be determined prior to deciding this case, quite apart from its procedural aspects. The substantive questions presented raise alternatives which cannot consistently co-exist under the facts. For example:

If the agreement is in fact one for the conditional sale of property, a whole separate body of law applies to the facts of the situation, *including the measure of damages*. The measure of damages for breach of a conditional sales contract considers four elements:

- One — The original contract price.
- Two — The cost of repossession and resale.
- Three — Payments made by the buyer.
- Four — The proceeds of resale.

(Whether or not element *Two*, supra, is to be considered oft-times depends on the terms of the contract.)

Under a contract for conditional sale, the buyer is entitled to receive credit upon his purchase price for the proceeds of the sale of the property after repossession by the seller *as a matter of law*. (See *IXL Stores Company v. Moon* (1916) 49 Utah 262, 162 P. 622.) The authorities cited in Point IV of Defendant's brief on the original appeal indicate that the majority rule is that the proceeds of resale are *all* the seller is entitled to upon repossession, in the absence of a contractual provision to the contrary. The majority rule has been adopted in Utah, at least by inference. (See *IXL Stores Company v. Moon*, supra; *Franz v. Hair* (1930) 76 Utah 281, 289 P. 130, 83 ALR 990). A full discussion of this area, with cases, is found at 37 ALR 91; 83 ALR 959; 99 ALR 1288; 49 ALR 2d 15 at 66.

On the other hand, if the contract is in fact a lease agreement, upon default the lessor would be entitled to recover all unpaid monthly rentals to date of repossession plus damages resulting from the default of the lease. Typically this would require the lessor to repossess the equipment and re-lease it at the best terms he could secure, charging the original lessee with the difference in the rentals. There would normally be no need to account to the original lessee for proceeds from resale after repossession in this case.

Thus it may be seen that there is considerably more to Defendant's defense than just whether or not the Plain-

tliff stated a cause of action. Whether Plaintiff may recover at all, and if so, what his measure of damages may be, are questions of substantive law. It is submitted that this case cannot properly be decided without coming to grips with those precise issues. Quite apart from the procedural aspects of the case, the question of whether the contract is one of conditional sale or of lease is of enormous importance. Extensive authorities on this question are cited in Point III of Defendant's brief on the original appeal. Once that question is decided, the right of the Plaintiff to recover at all must be determined in the light of *IXL Stores Company v. Moon*, supra, and the cases listed in the ALR annotations cited above. Only then may a proper evaluation be made of this case.

POINT II.

THE OPINION OF THE COURT AS WRITTEN IS UNJUST TO DEFENDANT IN THAT IT AWARDS THE PLAINTIFF \$2,823.00 MORE THAN IT ORIGINALLY BARGAINED TO RECEIVE UPON EXECUTION OF THE AGREEMENT, *PLUS* INTEREST AND ATTORNEYS' FEES.

By the opinion of the Court, the Plaintiff is to be given judgment against the Defendant for \$ 7,687.00 (17 months times \$511.00; in addition Plaintiff is to receive interest and attorney's fees on the above amount.)

Plaintiff has already received in payments from Defendants	1,000.00
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Plaintiff has also received the proceeds from the sale of the equipment, after repossession of	6,400.00
--	----------

Total amount received or to be received by Plaintiff	\$15,087.00
(Not including interest and attorneys' fees.)	

Amount for which Plaintiff originally agreed to transfer title of equipment to Defendant, including interest	\$12,264.00
--	-------------

Additional recovery to Plaintiff.....	\$ 2,823.00
---------------------------------------	-------------

Even deducting repair and repossession costs of \$1,022.00, the excess is \$1,801.00. There was no theory advanced to justify this enrichment of Plaintiff.

The issue, "What is the proper measure of damages" framed at the pre-trial was inserted on the theory that if the agreement was a lease, Defendant was not entitled to an offset for the proceeds of resale, but if the agreement was a conditional sale contract then Defendant was entitled to an offset as a matter of law.

If such was not the case by the pleadings, at least the trial court admitted evidence of the resale and the amount realized. This court, at the very least, should do

justice by directing the amendment of the pleadings to conform to the undisputed proof and allow the Defendant to set-off the proceeds of resale.

CONCLUSION

It is respectfully submitted that this case involves directly important issues of substantive law which *cannot* be disposed of in terms of procedural law. Serious consideration must be given to what the law is, because it affects the entire business community of this state. As a noted jurist once said:

“I do take law very seriously, deeply seriously, because fragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that’s all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling.”

Respectfully submitted,

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